No. 80-1036

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In the Supreme Court of the United States

OCTOBER TERM, 1980

MACHINE TOOL AND GEAR, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Board properly issued a bargaining order as a remedy for petitioner's violations of Section 8(a)(1) and (3) of the National Labor Relations Act.

2. Whether substantial evidence supports the Board's finding that employee Gregory Stone was an employee within the meaning of Section 2(3) of the Act, rather than a supervisor as defined by Section 2(11) of the Act.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-3a) is not officially reported. The decision and order of the National Labor Relations Board (Pet. App. 1b-28c) are reported at 237 N.L.R.B. 1109.

JURISDICTION

The order of the court of appeals (Pet. App. 1a-3a) was entered on September 30, 1980. The petition for a writ of certiorari was filed on December 29, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth in the petition (vi-xii).

STATEMENT

1. Petitioner manufactures small automotive parts and employs about 40 employees, 30 on the morning or day shift and the rest on the afternoon shift, which runs from 3:30 p.m. until midnight (Pet. App. 1c-3c; C.A. App. 179).[1] At the time of the events herein, the morning shift was supervised by Shop Superintendent Berry and Foreman Keener, both of whom stayed for the first two hours of the afternoon shift (Pet. App. 2c, 3c; C.A. App. 55, 265). When the afternoon shift employees arrived, they would begin work on their regular machines without any instructions since cards posted at the machines indicated the number of parts that were needed to complete a particular order (Pet. App. 3c; C.A. App. 56, 78, 219-220). Before leaving, Berry and Keener would brief employee Stone concerning the parts to be produced for the rest of the shift, and the work that he was to do (Pet. App. 3c; C.A. App. 55, 78, 101-102). Stone, who was senior to the other shift employees and knew how to operate all the machines, was "in charge of" the shift after Berry and Keener left, and a machine operator who ran out of work would look to him for instructions (Pet. App. 3c-4c; C.A. App. 54-55, 97, 135, 153-154). He sometimes moved employees to different machines if this was necessary to produce the required parts (Pet. App. 4c; C.A. App. 54-55, 78-79, 135, 155-156). Stone did not operate a machine, but performed the work Foreman Keener had assigned him, ground tools for the screw machine, and checked to make sure that the machines were operating properly (Pet. App. 3c; C.A. App. 54, 101-102). If employees were standing around talking, he would tell them to return to their machines (Pet. App. 3c; C.A. App. 99, 102, 155). He locked up when the shift was over (Pet. App. 4c; C.A. App. 54).

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[1] "C.A. App." refers to the joint appendix to the briefs of the parties in the court of appeals. "GCX" refers to the General Counsel's Exhibits contained in the record.

Occasionally he substituted for Keener on the morning shift, and had recommended various employees who were hired by management (Pet. App. 4c; C.A. App. 55-58, 87-89, 104-105, 117-118). Stone, however, could not hire, fire or discipline employees, and his recommendations that these actions be taken were not always followed (Pet. App. 4c-6c; C.A. App. 58, 135-136, 105, 154, 156, 213-214).

In November 1976, employees Stone and Stanley distributed authorization cards in the shop for the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW ("the Union") (Pet. App. 2c; C.A. App. 94-95, 99, 101, 60-61, 162-163). By November 24, they had collected signed cards from a majority of the shop's employees (Pet. App. 2c, 20c; GCX 12-21, 24-26, 28-37). During this period, Shop Superintendent Berry questioned Stanley as to "what the deal was" respecting an authorization card Berry had obtained, and told both Stanley and Stone that he was sure that the plant would close down if a union came in (Pet. App. 8c, 7c; C.A. App. 172-176, 68-69). On another occasion, Berry told Stone that Tom LeBlanc, son of petitioner's president, had wanted to fire Stanley earlier that day because of his union activities, but that Berry had dissuaded him (Pet. App. 2c, 7c; C.A. App. 67-68).

Over Thanksgiving weekend, petitioner's president Joseph LeBlanc and another son, General Manager Timothy LeBlanc, learned that a union campaign was going on in the shop and that Stone was passing out union cards (Pet. App. 2c, 11c, 17c; C.A. App. 206-207, 224-225). On Monday, when Timothy LeBlanc returned to the shop, he learned that Stanley was also involved (Pet. App. 7c, 11c, 13c; C.A. App. 252). He summoned Stone to his office, questioned him about his and Stanley's union activity, and tried to persuade Stone to stop; when Stone refused, LeBlanc suggested he seek a job elsewhere with a unionized company (Pet. App. 7c; C.A.

App. 70-71, 207-209, 267). That afternoon, Timothy LeBlanc told Stone that he had decided to lay off the afternoon shift and to transfer Stone to the day shift (Pet. App. 14c; C.A. App. 71, 72). By the end of the following day, LeBlanc had laid off fourteen employees, including four day-shift employees (Pet. App. 14c, 16c; C.A. App. 119-120, 146, 148-149, 289). Two days later, LeBlanc terminated Stone, admittedly because of his union activity (Pet. App. 11c; C.A. App. 73-74, 209-211). On the same day, LeBlanc laid off Stanley for "stirring up a commotion among the workers" (Pet. App. 12c-13c; C.A. App. 173). Stanley told LeBlanc that his action was illegal, but LeBlanc said that he had "checked around" and had been told that this "was the best way to handle it" (Pet. App. 13c; C.A. App. 173). On the very day that Stanley was laid off, petitioner began recalling employees laid off three days earlier (Pet. App. 16c; C.A. App. 75, 289). By the end of January, petitioner had recalled most of those laid off and hired two new employees (Pet. App. 16c-17c; C.A. App. 289-290, 75). Stanley, however, was never recalled (Pet. App. 13c; C.A. App. 289).

In the period following the layoffs, petitioner's supervisors questioned those who wished to return as to their possible union involvement; petitioner also questioned an employee who had not been laid off concerning the union activities of those still working in the shop (Pet. App. 8c-9c; C.A. App. 151-152, 159, 124-125, 221-222). On December 23, petitioner gave its employees a Christmas bonus of a week's pay each as a reward for their "hard work" and "loyalty," although petitioner had been phasing out its practice of giving employees hams and turkeys at Christmas and Thanksgiving and had not given them a cash bonus since sometime in the 1960's (Pet. App. 9c-10c; GCX 3, C.A. App. 222-223, 229, 125-126, 115, 75-76).

On January 12, 1977, the Union wrote to petitioner requesting recognition. Petitioner received this letter on

January 14 but ignored it (Pet. App. 20c; GCX 2, C.A. App. 45-46, 50).

2. Affirming the administrative law judge's decision, the Board found that employee Stone was a leadman and not a supervisor since he was "for the most part * * * a conduit for the management officials" and "[a]ny authority he exercised * * * was within [petitioner's] guidelines, not requiring the use of independent judgment" (Pet. App. 6c). The Board also found that, immediately following its discovery of the union campaign in the shop, petitioner embarked on a "course of unlawful conduct" (Pet. App. 2b). Petitioner violated Section 8(a)(1) of the Act by (1) coercive interrogation of employees concerning their union activities as well as the union activity of others, (2) threats to close the plant if the union were selected as bargaining representative, (3) threats to discharge or deny reinstatement because of employee support for the Union, and (4) granting a Christmas bonus to induce employees to renounce the Union; petitioner violated Section 8(a)(3) of the Act by discharging employees Stanley and Stone for initiating the union campaign, and by laying off fourteen employees in retaliation for the interest shown by employees in the Union (Pet. App. 1b-2b, 21c-22c).

Moreover, the Board found that these unfair labor practices "were both extensive in nature and [in] impact," and that a "natural consequence of such conduct was to instill fear in the employees, to stifle further interest in the Union and to dissipate the Union's majority status already achieved. A fair election cannot, after such conduct, be insured by the use of traditional remedies * * * " (Pet. App. 22c). Therefore, in addition to requiring reinstatement and backpay for those laid off and discharged, the Board, noting that at the time the Union requested recognition it possessed valid authorization cards from a majority of the employees in the

unit (Pet. App. 2b, 20c), ordered petitioner to bargain with the Union as the representative of its employees (*id.* at 6b-7b).

Finally, although the complaint did not in terms allege a violation of Section 8(a)(5) of the Act, the Board also found that petitioner's refusal to bargain after the Union demanded recognition violated Section 8(a)(5). That finding was warranted, the Board stated, because "all of the elements necessary to prove a violation of Section 8(a)(5) of the Act were fully litigated and established" in the course of establishing the need for a bargaining order in this case (Pet. App. 3b).

3. The court of appeals enforced the Boards' order by *per curiam* order (Pet. App. 1a-3a). The court found substantial evidence to support the Board's findings that Stone "did not hire, fire, or discipline, but was a mere conduit for the directions of the [petitioner's] actual supervisory personnel," and, therefore, that he was not a supervisor (Pet. App. 2a). The court also found substantial evidence to support the conclusion that petitioner engaged in activity violative of Section 8(a)(1) and (3) of the Act (Pet. App. 2a). Finally, the court upheld the Board's bargaining order, noting that such a remedy for petitioner's unfair labor practices was "not an abuse of the discretion given the Board under § 10(c) of the Act" (Pet. App. 3a).[2]

ARGUMENT

1. Petitioner contends (Pet. 3-10) that the decision of the court of appeals upholding the Board's bargaining order

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[2]In addition to *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), the court cited *NLRB* v. *Production Industries, Inc.*, 425 F. 2d 1206, 1207 (6th Cir. 1970), in which it had found a bargaining order "necessary and appropriate" on the basis of fewer and less serious unfair labor practices than those committed by petitioner here (Pet. App. 3a).

conflicts with *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), and cases in the Second, Fourth, Fifth, Sixth and Seventh Circuits, in that the Board here did not explain why the unfair labor practices created a situation in which a free and fair election was unlikely. But in fact the administrative law judge did explain that the result of petitioner's extensive unfair labor practices was to instill fear in the employees and to stifle further interest in the Union (Pet. App. 22c), and the Board adopted those findings, concluding that "a free and fair election is unlikely in the[se] circumstances" (Pet. App. 2b). The court below found this exercise of the Boards' discretion proper (Pet. App. 3a). Thus, the decision in this case is fully consistent with *Gissel*, in which this Court approved the use of the bargaining order in cases where the Board finds the employer's conduct has a "tendency to undermine majority strength and impede the election processes," and therefore that "employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order * * * " (395 U.S. at 614).

The other cases cited by petitioner are distinguishable in principle or on their facts. Unlike this case, *NLRB* v. *General Stencils, Inc.*, 438 F. 2d 894, 902-903 (2d Cir. 1971); *NLRB* v. *Appletree Chevrolet, Inc.*, 608 F. 2d 988 (4th Cir. 1979); and *Peerless of America, Inc.* v. *NLRB*, 484 F. 2d 1108, 1119 (7th Cir. 1973) are cases in which the courts were unable to find substantial evidence to support some of the Board's conclusions as to the illegality of the acts on which the bargaining orders were based; as a result, the courts were unsure whether the Board would have issued the bargaining orders based only on the remaining violations. In *NLRB* v. *American Cable Systems, Inc.*, 427 F. 2d 446 (5th Cir.), cert. denied, 400 U.S. 957 (1970), the court denied enforcement because the Board had refused to consider evidence "that a complete turnover in employees and the departure of the only management official involved in the unfair labor

practices made a free election possible at that time" (*id.* at 448). In the instant case, however, the management official responsible for most of the unfair labor practices, Timothy LeBlanc, was petitioner's general manager and the son of petitioner's owner; he is still the most powerful supervisor in the shop and, so far as the record shows, the composition of the unit has not changed substantially. The majority of those employees who were laid off were ultimately recalled or are awaiting reinstatement under the Board's order (Pet. App. 16c-17c). In *Automated Business Systems* v. *NLRB*, 497 F. 2d 262 (6th Cir. 1974); *First Lakewood Assoc.* v. *NLRB*, 582 F. 2d 416 (7th Cir. 1978); and *Red Oaks Nursing Home, Inc.* v. *NLRB*, 105 L.R.R.M. 3028 (7th Cir. 1980), the bargaining orders were supported only by violations of Section 8(a)(1) and not, as in the instant case, by the discharge of the two leading union adherents and the sudden layoff of fourteen additional employees.

Finally, contrary to petitioner's contention (Pet. 6-9), nothing in the decisions cited above suggests that the Board may not fulfill its obligation to give reasons for a bargaining order by adopting the administrative law judge's analysis. Indeed, the only court which has considered such an argument has held that, under this Court's decision in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 525 (1978), agencies should be left free to establish their own procedures for decision-making; therefore,

> [s]o long as the ALJ has provided a statement of reasons for its recommendation of a bargaining order * * * and so long as the NLRB has specifically indicated its adoption of the findings and reasoning of the ALJ * * * the need for a separate elaboration of the factors prompting a bargaining order would appear to have been met.

Kenworth Trucks of Philadelphia v. *NLRB*, 580 F. 2d 55, 62-63 (3d Cir. 1978) (opinion on rehearing). See also *NLRB* v. *Solboro Knitting Mills, Inc.*, 572 F. 2d 936, 944 (2d Cir. 1978) ("we agree, for the reasons given by the ALJ [and adopted by the Board], that the bargaining order was appropriate under *Gissel*").

2. Petitioner further contends (Pet. App. 14-16) that the court of appeals erred in affirming the Board's conclusion that Stone was not a supervisor. That question raises only an evidentiary issue which does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). In any event, as is evident from the facts set out in the statement, *supra*, there was ample evidence to support the Board's conclusion that Stone belonged to that class of "straw bosses, leadmen, set-up men, and other minor supervisory employees" whom Congress did not intend to exclude from the Act's coverage. See S. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947).[3]

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[3]Contrary to petitioner's assertion (Pet. 11-14), affirmance of the Board's conclusion that Stone was not a "supervisor," within the meaning of Section 2(11) of the Act, 29 U.S.C. 152(11), is neither "inconsistent" nor "at variance with" the decisions in *NLRB* v. *Porta Systems Corp.*, 625 F. 2d 399 (2d Cir. 1980); *NLRB* v. *Publishers Printing Co.*, 625 F. 2d 746 (6th Cir. 1980); *NLRB* v. *Pilot Freight Carriers, Inc.*, 558 F. 2d 205 (4th Cir. 1977); *NLRB* v. *Big Ben Department Stores, Inc.*, 396 F. 2d 78 (2d Cir. 1968); *Trailmobile Division, Pullman, Inc.* v. *NLRB*, 379 F. 2d 419 (5th Cir. 1967); or *Buddy Schoellkopf Products, Inc.*, 164 N.L.R.B. 660, 666 (1967), enforced 410 F. 2d 82 (5th Cir. 1969). In each of these cases the court recognized that the question of the individual's status as a "supervisor" depended entirely on the facts in the record pertaining to the individual's authority to exercise independent judgment in the course of responsibly directing his fellow employees. As the Second Circuit observed, "the gradations of authority 'responsibly to direct' the work of others from that of general manager or other top executive to 'straw boss' * * * are so infinite and subtle that of necessity a large measure of informed discretion is involved in the exercise by the Board of its primary function to determine those who as a practical matter fall within the statutory definition of a 'supervisor' * * *. Each case must be decided on its own facts * * *" (*NLRB* v. *Big Ben, supra*, 396 F. 2d at 82) (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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